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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NINA KIDD,

Plaintiff and Appellant,

v.

CALIFORNIA HIGHWAY PATROL, et
al.,

Defendants and Respondents.

A137930

(Mendocino County
Super. Ct. No. SCUKCVPM 1259614)

I. INTRODUCTION

The trial court sustained a demurrer, without leave to amend, to a second amended complaint filed by appellant Nina Kidd alleging loss of consortium as a result of a highway accident occurring several years earlier involving her husband's truck, which he was driving, and a California Highway Patrol (CHP) vehicle. The trial court ruled that appellant's loss of consortium claim was barred because she had "failed to submit a timely government claim for loss of consortium based on her husband's automobile accident, as required by the Government Claims Act ([Gov.] Code, [§] 900 et seq.¹), specifically Government Code sections 945.4 and 945.6 subdivision (a)(1)." Based on that ruling, judgment in favor of respondents was entered with respect to that claim.

¹ All further statutory references are to the Government Code, unless otherwise noted.

Appellant appeals, contending that her loss of consortium claim was not, under the factual circumstances present here, barred. We disagree and hence affirm the judgment in favor of respondents and against appellant.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2011, a CHP vehicle driven by Officer Thomas Adams collided with a truck owned and being driven by appellant's husband, Jeff Kidd. That accident resulted in the death of Officer Adams.

On July 13, 2011, appellant filed a claim pursuant to section 945.4 alleging that she had been damaged in the amount of \$250,000 because of the accident. As required, appellant described her "specific damage or injury" as "[s]eizure due to stress." "[T]he circumstances that led" to that damage or injury were described as follows: "Claimant's husband was involved in a motor vehicle incident on February 15, 2011. Claimant had to retrieve items out of her husband's vehicle and while doing so had a seizure. This has been diagnosed as a seizure due to stress related to her husband's motor vehicle incident." Appellant further elaborated that although she was "not present when the collision occurred she suffered a stress related seizure while retrieving items out of her husband's vehicle, shortly after the subject incident."²

In January 2012, the Kidds filed a complaint against the State of California, the CHP, and CHP Officer Paul Dahlen. That complaint alleged both motor vehicle negligence against the State and the CHP and added a defamation claim against Officer Dahlen. The latter claim was based on the Kidds' allegation that Officer Dahlen had wrongfully asserted to the media that the accident was Jeff Kidd's fault.

In April 2012, the Kidds filed a First Amended Complaint in which they added a cause of action of action for dangerous condition of public property against both the State and the California Department of Transportation (a claim they later dismissed).

Respondents demurred to the First Amended Complaint on the basis that appellant "was not present at the accident" and could "not assert a claim for stress or emotional

² Appellant's seizure occurred on February 17, 2011.

distress because she did not contemporaneously observe the accident and the [CHP] does not owe her a special duty of care to avoid causing her emotional distress, even if a seizure ultimately results from that stress.”

The Kidds did not oppose the respondents’ demurrer and the parties agreed that the Kidds could have “two weeks from the date the demurrer is granted to file an amended complaint.” The trial court permitted the Kidds to do so and, accordingly, the Kidds filed a Second Amended Complaint against the CHP and Officer Dahlen. This complaint for the first time added a cause of action for loss of consortium.

Respondents demurred to the Second Amended Complaint. They contended that appellant’s cause of action for loss of consortium was “barred by the Government Claims Act, specifically Government Code section 945.4, as Plaintiff Nina Kidd did not present a loss of consortium claim in her government claim.”

On December 18, 2012, the trial court sustained respondents’ demurrer to appellant’s loss of consortium claim without leave to amend “on the grounds that Plaintiff Nina Kidd failed to submit a timely government claim for loss of consortium based on her husband’s automobile accident, as required by the Government Claims Act” A judgment of dismissal as to appellant’s claim was entered on January 29, 2013.

Appellant filed a timely notice of appeal on February 13, 2013.

III. DISCUSSION

In determining the sole issue on appeal—whether appellant’s claim for loss of consortium was timely asserted in her government claim—we begin with section 945.4, which provides as follows: “Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.”

In *Stockett v. Assn. of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447 (*Stockett*), our Supreme Court explained the nature of such a claim: “[S]ection 945.4 requires each cause of action to be presented by a claim complying with section 910, while section 910, subdivision (c) requires the claimant to state the ‘date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.’ If the claim is rejected and the plaintiff ultimately files a complaint against the public entity, the facts underlying each cause of action in the complaint must have been fairly reflected in a timely claim. [Citation.] ‘[E]ven if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.’ [Citation.]

“The claim, however, need not specify each particular act or omission later proven to have caused the injury. [Citation.] A complaint’s fuller exposition of the factual basis beyond that given in the claim is not fatal, so long as the complaint is not based on an ‘entirely different set of facts.’ [Citation.] Only where there has been a ‘complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim’ have courts generally found the complaint barred. [Citation.]” (*Stockett, supra*, 34 Cal.4th at p. 447.)

The *Stockett* court surveyed a number of cases similar to this one in which demurrers were granted because a complaint alleged “ ‘a factual basis for recovery which is not fairly reflected in the written claim.’ ” (*Stockett, supra*, 34 Cal.4th at p. 447.) For example, in *Fall River v. Superior Court* (1988) 206 Cal. App. 3d 431 (*Fall River*), “the plaintiff was injured at school when a steel door struck his head. His notice of claim stated the injury was caused by the school’s negligent maintenance of the door, but his complaint additionally alleged the school had negligently failed to supervise students engaged in horseplay. [Citation.] The court held the factual divergence between claim and complaint was too great; the complaint alleged liability ‘on an entirely different factual basis than what was set forth in the tort claim.’ [Citation.]” (*Stockett, supra*, 34 Cal.4th at p. 448.)

Stockett also cited several cases involving similar factual situations including “*Lopez v. Southern Cal. Medical Group* (1981) 115 Cal.App.3d 673, 676-677 (claim alleging the state negligently issued a driver’s license to defendant despite his epileptic condition was insufficient to allow amended complaint alleging the state neglected to *suspend or revoke* license despite defendant’s failure to comply with accident reporting and financial responsibility laws); *Donohue v. State of California* (1986) 178 Cal.App.3d 795, 803-804 (claim alleging the Department of Motor Vehicles negligently *allowed an uninsured motorist to take a driving test* did not give adequate notice of complaint’s allegation that the department negligently *supervised and instructed* the driver during the driving exam).” (*Stockett, supra*, 34 Cal.4th at p. 448, fn. 4; see also *Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79-81 [claim alleged medical malpractice by Department of Corrections while complaint alleged failure by it to summon medical care]; *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 82-83 (*Shelton*) [claim alleged personal injuries by wife in automobile accident in which her husband was also injured, while amended complaint alleged loss of consortium]; and *Connelly v. State of California* (1970) 3 Cal.App.3d 744, 753 [claim alleged property damage due to erroneous information provided by the State re anticipated rise in river, while complaint alleged negligence in the operation of the dams].)³

Each of these cases illustrate situations in which a cause of action may not be maintained because it is premised “on an entirely different factual basis than what was set forth in the tort claim.” Here, appellant’s July 13, 2011, claim submitted to the State did not make the slightest mention of loss of consortium or anything even close to it. Rather, it stated that her “specific damage or injury” was: “Seizure due to stress” that occurred

³ In neither of her briefs does appellant distinguish nor even cite most of the authority noted above, which make very clear that the Government Code-mandated pre-complaint claim and the cause of action asserted in the complaint must be similar if not closely-related. Thus, notwithstanding the trial court’s reliance on it, *Fall River* is not cited much less distinguished in appellant’s briefs to us. Nor are most of the very similar holdings in cases cited in footnote 4 of *Stockett* discussed or even cited.

two days after the automobile accident, when she “had to retrieve items out of her husband’s vehicle and while so doing had a seizure.”

Her loss of consortium claim involves an entirely different matter than her stress-related seizure. The leading case regarding the nature of a loss of consortium claim is *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382 (*Rodriguez*). In that case, the court overruled its previous holdings that there was no cause of action for loss of consortium available in this state, and joined the majority of other states in recognizing the viability of such a claim. In so doing, the court quoted from a New York case which had stated: “ ‘The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more.’ [Citation.]” The *Rodriguez* court also held that “consortium includes ‘conjugal society, comfort, affection, and companionship.’ An important aspect of consortium is thus the *moral* support each spouse gives the other through the triumph and despair of life.” (*Rodriguez, supra*, 12 Cal.3d at pp. 404-405.) One of our sister courts recently wrote: “ ‘Consortium’ refers to ‘ “the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship.” [Citation.]’ [Citation.] Consortium also encompasses sexual relations, moral support, and household services. [Citation.]” (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223.) Finally, as our Supreme Court has recently held, the “primary right” encompassed by a loss of consortium action is “the right not to be wrongfully deprived of spousal companionship and affection” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.)

Nothing even close to those matters is encompassed by appellant’s specific claim that she suffered a “[s]eizure due to stress” when securing “items out of her husband’s vehicle” two days after he and that vehicle were in a traffic accident. Therefore, because appellant’s loss of consortium claim alleges a factual basis for recovery that is not fairly reflected in the written claim for appellant’s stress-related seizure, we find no error on the part of the trial court in granting respondents’ demurrer.

Appellant, however, argues that she gave sufficient notice of her loss of consortium claim because “even though she did not specifically identify loss of consortium in her claim, she clearly did identify the fact that she had suffered personal injury.” This, however, amounts to nothing more than an argument that once a claimant specifies a personal injury sustained as a result of an accident, she is then free to later include any other claims related to that accident. First, appellant alleged a *very specific type of injury* arising from the automobile accident, an injury occurring two days after that accident. Her claim was not in any way a generalized or broad personal injury claim. Second a loss of consortium claim is entirely different from appellant’s claim for a stress-related injury she sustained directly from the accident. As respondents note, the *Shelton* court rejected a similar effort to later add a loss of consortium cause of action in a case in which the government claim alleged only individual personal injuries. (*Shelton, supra*, 56 Cal.App.3d 66.) In that case, both a husband and wife were injured in an automobile accident and sued several defendants, including the State of California and the County of Santa Clara, because of those injuries, alleging that the road on which they were driving was negligently constructed. Both plaintiffs had filed claims against both the State and County prior to filing their lawsuit. (*Shelton, supra*, 56 Cal.App.3d at pp. 70-71.) For three separate reasons, Division One of this court denied appellants’ petition for a writ of mandate to allow them to amend their complaint to allege a claim for loss of consortium. The court explained: “Nor can the new [loss of consortium] cause of action ‘piggyback’ on the old claim. As we have seen, the claim of each spouse is defective in failing to allege any injury to the claimant by reason of the injuries to the other spouse.” (*Id.* at p. 82.)

Appellant does not acknowledge that this ruling is directly adverse to her position, but simply cites *Shelton* for the proposition that it is necessary “to specifically separate the claims of one spouse from another that arises from a motor vehicle accident involving the other spouse.”

We have no problem with that not-particularly-pertinent observation by appellant concerning one of the holdings of *Shelton*, but again we note that nowhere does she

address the truly pertinent holding of *Shelton*—and the reason it was cited by the trial court—i.e., that there must be a *similar* prior governmental claim before a cause of action can be sustained against the governmental entity.

Rather than addressing the significant additional authority that runs adverse to her contentions to us, appellant argues that a case strongly supporting her position is *Rowland v. Superior Court* (1985) 171 Cal.App.3d 1214 (*Rowland*). In that case, the plaintiff was a father who was suing a motel for the wrongful death of his son, which had occurred in the pool area of a motel. The plaintiff's original complaint alleged 12 causes of action against the motel, three of them brought by the father and the others by the decedent's minor siblings. Two years after the death of his son, the father sought to add three additional causes of action based on negligent infliction of emotional distress. The trial court sustained a demurrer to those causes of action, but the appellate court reversed based "on the well-established policy of liberally allowing amendments is to avoid the bar of the statute of limitations where the recovery sought in both pleadings is based on the same general set of facts," a policy, the court stated "has been applied in a long line of cases." (*Id.* at pp. 1216-1217.)

The court continued: "Here, the amendment adding the emotional distress causes of action to the wrongful death causes of action seeks recovery for the same accident—the electrocution—and for the same injury—Rowland's loss of his son. This is sufficient, in our view, to bring the amendment within the . . . test of the same general set of facts, permitting it to relate back to the date of the original complaint." (*Rowland, supra*, 171 Cal.App.3d at p. 1218.)

This principle simply is not applicable here. In the instant case the claim filed by appellant clearly *did not* relate to, much less allege, the same injury. Rather, it alleged an entirely different one: stress caused by searching her husband's car two days after it and he had been in an automobile accident, a theory which is not even closely related to the loss or diminishment of a personal relationship between husband and wife. Further, the timing of the two theories is not at all the same. The stress related to appellant's search

of her husband's car occurred, per her claim form, two days after the accident. A loss of consortium would have necessarily consumed far more time.

We also reject appellant's argument that the deficiencies in her claim should be excused because she is in substantial compliance with the requirements of the Government Claims Act, a ground the trial court did not consider in ruling on this matter. Appellant would have been in substantial compliance if her subsequent complaint simply elaborated and added detail to her claim. Here, of course, appellant's complaint went far beyond that.

The parties also raise another issue not addressed in the trial court's order: that appellant's claim is barred by the statute of limitations. We need not address this issue. The trial court sustained respondent's demurrer to appellant's loss of consortium cause of action on the explicit—and sole—ground that appellant had “failed to submit a timely government claim for loss of consortium based on her husband's automobile accident” We agree with the trial court that there was a significant and fatal gap between (1) the pre-litigation claim presented by appellant to respondents, and (2) her loss of consortium cause of action.

Finally, appellant's reply brief adds another argument in support of her appeal, which is that respondents waived any alleged deficiency in her claim form when, in their letter rejecting appellant's claim, respondents stated “the Claim is being rejected because the issues presented are complex and outside the scope of analysis and interpretation typically undertaken by the Board.” Appellant argues that this statement reflects “an internal policy doing away with any investigation of claims that are submitted” and, therefore, constitutes “a waiver of the right to have a claim that provides sufficient information to investigate in the first place.” We fail to see how this broad statement reflects any such “internal policy.” Nor is there any support for the argument put forward here by appellants that a rejection of a claim on the stated ground amounts to a waiver of the requirements set forth in the Government Claims Act.

IV. DISPOSITION

The judgment appealed from is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.

A137930, *Kidd v. California Highway Patrol, et al.*